

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

WAPP TECHNOLOGY LTD : DOCKET NO. 4:18CV469
:
VS. : SHERMAN, TEXAS
:
MICRO FOCUS INTERNATIONAL : APRIL 1, 2020
:
3:00 P.M.

WAPP TECHNOLOGY LTC :
:
VS. : DOCKET NO. 4:18CV501
:
WELLS FARGO :

WAPP TECHNOLOGY LTD :
:
VS. : DOCKET NO. 4:18CV519
:
BANK OF AMERICA :

TELEPHONE CONFERENCE
BEFORE THE HONORABLE AMOS L. MAZZANT,
UNITED STATES DISTRICT JUDGE

APPEARANCES (BY TELEPHONE):

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1 COURT REPORTER:

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23 PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
24 PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.
25

1 THE COURT: Good afternoon. This is Judge Mazzant.
2 We're here in Case 4:18CV469, 4:18CV501 and 4:18CV519.

3 Everyone has already made their appearances, and again,
4 as I think my courtroom deputy just indicated, please
5 identify yourself every time you speak, because we are in
6 the courtroom with my court reporter trying to get a good
7 record.

8 And I believe this call was initiated by the Plaintiff
9 after I think motions to compel were filed and the Court
10 denied those. So if -- whoever is going to speak on behalf
11 of the Plaintiff, if you would like to go ahead and identify
12 yourself and go first and tell me what's going on.

13 MR. DEVLIN: Your Honor, thank you. This is Tim
14 Devlin speaking on behalf of Plaintiff. My colleague, Mr.
15 Parker, will deliver the argument, but I wanted to get on the
16 phone and just acknowledge the error we made in filing this as
17 a written motion originally. I wanted to express to the Court
18 that we take Your Honor's procedures seriously, and my sort of
19 motto is make every mistake just one time. We do have internal
20 procedures to try to prevent that. They obviously did not
21 work, and I've thought about that and we have implemented
22 improvements in those procedures to make sure this doesn't
23 happen again, in this case or any other.

24 I just wanted to jump on the phone personally and make
25 sure Your Honor was aware of that, that we did take this

1 seriously and were not lightly taking anything about our
2 misstep in filing this as a written motion.

3 THE COURT: Mr. Devlin, it's --

4 MR. DEVLIN: If Your Honor wants any further
5 information on that, I'm happy to offer that. I don't want to
6 waste anyone's time.

7 THE COURT: No, that's --

8 MR. DEVLIN: Whatever Your Honor would like.

9 THE COURT: Mr. Devlin, thank you for the apology.
10 It's not necessary.

11 It's a procedure the Court has. I will tell you, it
12 happens quite often that attorneys file this. And I take no
13 offense whatsoever. It's just I require more of this
14 informal procedure, and we resolve about 80 percent of the
15 discovery disputes this way, and hopefully I can do it
16 today. But it's nothing to worry about.

17 Okay. So, Mr. Parker, I understand you're going to
18 argue.

19 MR. DEVLIN: Thank you, Your Honor.

20 THE COURT: Go ahead.

21 MR. PARKER: Thank you, Your Honor. So this is
22 Henrik Parker.

23 And Wapp is here today seeking the Court's assistance
24 in compelling the Defendants in all of the three actions.
25 The positions taken, I believe, by the Defendants across all

1 three actions are identical with respect to this issue, so
2 it applies across the board, and our arguments apply across
3 the board as well.

4 And we are seeking to -- the Court's assistance to
5 compel the Defendants to comply with their discovery
6 obligations with respect to the scope of products as to
7 which they provide responsive discovery information.

8 Wapp has reasonably sought information going to various
9 Defendants' products and systems that embody various aspects
10 of the asserted claims. And while we think that the
11 Defendants are actually obligated to provide that
12 information even without our specifically asking for it, we
13 have asked for it in various fashions, and the Defendants
14 have unilaterally and consistently refused to provide any
15 discovery as to any product other than three specific
16 product systems that were included in Wapp's original
17 infringement contentions.

18 So, in essence, they're refusing to give us anything
19 that goes to any product that wasn't specifically and
20 originally accused of infringement, and that has taken place
21 in document production, interrogatory responses, mandatory
22 disclosures, source code production and even Rule 30(b)(6)
23 deposition notices.

24 We believe that this is contrary to law, and I'll get
25 into that in a second, but perhaps I should be a little more

1 specific here about what it is we've asked for that they
2 haven't been giving us.

3 In our first set of interrogatories we set out a
4 specific definition of a term that we use, accused
5 instrumentality, and perhaps that term was a little
6 aggressive. It could have been any term. It could have
7 just been relevant systems or something.

8 But in any event, the definition included -- and I'll
9 quote a little bit here -- all products, systems or methods
10 that have been purchased, used, made or developed by or for
11 Defendants that are capable of or advertised or marketed as
12 being capable of. And then we go on and describe various
13 acts of the kinds that are specifically covered in the
14 claims of the asserted patent steps. So the definition
15 clearly is looking for stuff that relates to products that
16 may embody the patented claims.

17 We use that term then to seek various types of
18 information in the interrogatories, you know, about design,
19 function, operation of products, about the role played by
20 various entities in making and selling those, and, you know,
21 financial information and sales channels about them.

22 In response to those interrogatories, the Defendants
23 asserted an objection, general Objection No. 12, alleging
24 initially generically that the definition was overly broad
25 and burdensome, but then when they got specific, stating

1 that the Defendants were going to interpret the defined term
2 as referring only to three specific systems, systems that
3 the Defendants alleged were the only ones that, according to
4 them, we had purported to provide a chart identifying
5 specifically where each element was found within each
6 identified product, which according to them, was as required
7 by the Local Patent Rules. So, in other words, they were
8 refusing to provide any discovery on any product beyond
9 those that were in our original infringement contentions.

10 Since the time of receiving those objections, they've
11 continually asserted that over all these other areas, and I
12 could certainly go through those but I don't know that we
13 need to at this point because the crux of the issue here is
14 really the overarching objection. And once that's resolved,
15 I think both parties or all parties will be able to apply it
16 appropriately.

17 I will point out, however, that during various meet and
18 confer communications, and in particular, in a couple of
19 letters that I sent to opposing counsel on February 5th and
20 13th, we provided more extensive, specific lists of product
21 systems that we felt fell within that definition that I read
22 to you earlier and the kind of discovery that we believe we
23 were entitled to and that they had an obligation to give us.

24 Notably, the Defendants have never contended that our
25 definition was -- the list of products that we provided,

1 that that was not reasonably related to the elements of the
2 asserted claims. There's really no dispute about the scope
3 being reasonable. It's only about whether or not they have
4 to do anything beyond the specific products in our
5 infringement contentions, our original infringement
6 contentions.

7 So Wapp believes that this is legally improper because
8 it's well-established in this district, as in probably most,
9 if not all districts, that as stated in epicRealm Licensing
10 versus Autoflex Leasing, a case from this district in 2007,
11 relevant discovery in a patent infringement suit includes
12 discovery relating to the technical operation of the accused
13 products as well as the identity of the technical operation
14 of any products reasonably similar to any accused products.

15 There are a bunch of cases that are to the same effect,
16 and we can certainly provide those if you desire.

17 In that case, I think it was Judge Folsom, in ruling
18 that the scope of discovery wasn't limited to products
19 identified in the infringement contentions but also included
20 reasonably similar ones, the Judge said that this finding
21 best comports with the notice pleading and broad discovery
22 regime created by the Federal Rules and the right to develop
23 new information in discovery.

24 So this is the crux of the issue. We think we're
25 entitled to discovery of products that are reasonably

1 similar to the accused products, but the Defendants have a
2 contrary view.

3 The definition was specifically tailored to encompass
4 not only the specifically identified ones but products that
5 were reasonably similar. Defendants don't deny that.

6 The Defendants have access to their own products, which
7 we don't have full access to. I'll talk about that in a
8 moment. But certainly for them to determine which products
9 fit within this definition should not be a particular
10 hardship or burden for them.

11 And it's no different than any other ongoing obligation
12 that a defendant or a party has in any litigation, to make
13 reasonable decisions about what information is related to
14 the action and should be produced without being -- any need
15 to be specifically asked for by the other side. So we think
16 the Defendants should be compelled to do that here.

17 In our meet and confers, the Defendants have contended
18 that we have to do more to get the information and that we
19 have to somehow meet what they describe as a four-part test
20 that they parsed from another case in this district,
21 Honeywell International versus Acer America, which according
22 to the Defendants they believe we have to show, one, that
23 the information sought is not publicly available; two, that
24 our infringement contentions gave the Defendant notice of a
25 specific theory of infringement; three, that the products we

1 seek discovery about operate in a manner that's reasonably
2 similar to that theory; and four, that we've been diligent
3 in seeking the information.

4 It's not entirely clear to us that this test is
5 mandatory or -- or controlling here. Even if it is, we
6 don't think there's really any legitimate dispute that we've
7 met the standards.

8 As to the first factor, many -- these are not the kind
9 of products that you can just go into your local Best Buy or
10 Apple store or something and grab one off of the shelf.
11 They are sophisticated systems that are set up on servers
12 and accessed remotely. And it is not something that we can
13 readily make the determination as to the breadth of products
14 or to fully analyze such products.

15 During the meet and confers, Defendants have implied
16 that at least some of the products have free demo versions
17 available on-line, and while that may be true to a certain
18 extent, clearly there are many products that -- for which no
19 such free demos are available. And even, while we have
20 specifically asked them, they have been unwilling to confirm
21 for us that any such free demo actually is complete and
22 robust enough that it encompasses or evidences the full
23 complexity of these products, such that we could make use of
24 those to entirely determine one way or the other whether
25 something infringes or -- or prove our case if it did

1 infringe. So it's just not feasible to say that we should
2 be able to get all these and make all these determinations
3 on our own.

4 The second factor is the theory of infringement, which
5 we believe we've done a very detailed job in our --
6 particularly our updated infringement contentions. There
7 are more than 150 pages of claim charts. And so I -- I
8 don't feel like there's any need to go into that further at
9 the moment.

10 The third factor is whether we're seeking stuff that's
11 reasonably similar, and certainly it has been our full
12 intent that what we are seeking is reasonably similar. That
13 was the idea behind the definition and tying it to claim
14 elements, so that we -- we don't have any interest in
15 getting information about stuff that's not going to be
16 relevant to this lawsuit, so I don't think there should be
17 any real dispute about that.

18 Then the final factor is whether we diligently sought
19 the information from the Defendants or -- and certainly,
20 we've been trying to get it. We -- we have asked them
21 multiple times. And as in the Honeywell case where it was
22 found that under similar facts, we've made sufficient
23 efforts to give them notice of our theories and what we're
24 after, and certainly we've come to the Court at a fairly
25 early stage in the discovery process.

1 So even if the four-part test applies, we feel like
2 we've met it. The Defendants have refused at every turn and
3 on multiple different contexts to provide this properly
4 requested information, and we're seeking the Court's
5 assistance to strike down Objection No. 12 and order that
6 the Defendants immediately provide all the requested
7 discovery for the full scope of products and systems that we
8 set forth in our definition, a definition that we feel
9 essentially just puts to words the scope of Defendants'
10 inherent discovery obligations that they should be providing
11 even without being asked.

12 So that's what I have for the moment, Your Honor.
13 Obviously, I'll wait to hear what the other side has to say.
14 Thank you.

15 THE COURT: Okay. Thank you. Response?

16 MR. REITER: Yes. Good afternoon, Your Honor. This
17 is Mark Reiter for the Defendants.

18 So to begin with, I -- with respect to my colleague on
19 the other side, I disagree with almost, I think, everything
20 that he said.

21 First of all, the law in this district, as Your Honor
22 is well aware, does not have a bright line rule as Plaintiff
23 is trying to say for discovery related to products that are
24 not identified in the infringement contentions, and that's
25 what we're talking about here is Plaintiff is asking, and we

1 believe literally is going on a fishing expedition, for any
2 products that might infringe.

3 You heard Mr. Parker say that they were just seeking
4 information about relevant systems, and that's very, very
5 broad. And he talked about and said systems that may embody
6 the asserted claims. That, again, is very, very broad.

7 What happened in epicRealm -- and I know Your Honor is
8 aware of this because in the Imperium decision that you
9 issued some years ago, I think 2012, you went through these
10 factors and you recognized what Judge Folsom said.

11 Judge Folsom said that the Court finds there is no
12 bright line rule that discovery can be obtained if related
13 to an accused product identified in the parties'
14 infringement contentions.

15 What Plaintiffs are trying to do here is set a bright
16 line rule that as long as it's reasonably similar or we say
17 all we want are things that are reasonably similar, we get
18 it. But that's not what Judge Folsom said either. Judge
19 Folsom said in epicRealm, the Court concludes that the scope
20 of discovery may, may include products and services that are
21 reasonably similar to those accused in the infringement
22 contentions.

23 And since Judge Folsom's decision, courts in this
24 district, including yourself, have applied what that may
25 factor is by putting together a four-factor test. It's not

1 that it may or may not apply that four-factor test, as Mr.
2 Parker said. It's quite clear that that four-factor test is
3 the test, consistent with what Judge Folsom said in whether
4 a party, a plaintiff may additionally get discovery into
5 products that are not identified in the contentions.

6 And those factors, Mr. Parker -- I do agree with him as
7 to what those factors are. Is the information publicly
8 available? Has Plaintiff identified a cognizable
9 infringement theory? Are the products that are -- that
10 discovery is being sought for reasonably similar in theory
11 to the products for which a theory has been stated? And was
12 the Plaintiff diligent?

13 Here Wapp has satisfied none of those factors. You
14 haven't seen a shred of evidence, there's no declaration, no
15 evidence at all from Wapp as to the efforts it went to to
16 try and demonstrate what information is available or not,
17 what its theories are.

18 And with respect to its theories, we do take issue that
19 Wapp has properly identified theories. We filed on
20 December 23rd -- we had a very brief telephone conversation
21 with Your Honor about this back in December. We filed a
22 motion to strike their contentions because they identified
23 no cognizable, no understandable theory. So we take issue
24 with whether they've done that.

25 There is no evidence here, even assuming they have

1 identified a theory, that the products for which they seek
2 discovery operate in a way similar to those for which they
3 charted, the third factor.

4 And four, there has been no diligence here.

5 And let me turn back to the point that Mr. Parker said
6 about the scope of their definition. Your Honor held in the
7 Imperium case, or recognized, I should say, in the Imperium
8 case that in the Honeywell case decided by Judge Love
9 following these four factors, the Court held that the
10 Plaintiff was, quote, not entitled to discovery of all of
11 Defendants' LCD products -- those were the products that
12 were accused there -- merely because the patent-in-suit
13 relates to LCD systems.

14 What Wapp has said by talking about may embody the
15 claims, relevant systems, is they are seeking discovery of
16 anything that might relate to the technology that's claimed
17 in the three asserted patents, and that was explicitly
18 denied in Honeywell, and Your Honor recognized that.

19 So with respect to publicly available information,
20 despite the fact that we believe that their contentions,
21 even as supplemented, are deficient, Plaintiff was
22 nonetheless able to find publicly available information
23 about the products that they did chart. They were able to
24 use that. They didn't need to have and they didn't rely on
25 operational or working versions, whether test or otherwise,

1 of the products to prepare the charts that they did prepare,
2 to identify the products that they did identify and chart.
3 They don't meet that here.

4 But putting that aside, there's reams of information
5 about all of the products that are sold by Micro Focus. We
6 have a declaration that we're ready to submit to Your Honor
7 that's almost 40 pages long from Mr. Robostoff, who is
8 Micro Focus's functional and performance portfolio director,
9 that explains page after page and picture after picture of
10 information that is available about the accused products --
11 not the accused products. The products that were sold by
12 the Defendants.

13 That includes manuals, not of just the current versions
14 of the products, but versions going back several years.
15 There are Help Centers where a party can put in any topic
16 about a product or potentially about a product and get help
17 and get information about that.

18 There are training videos. Micro Focus has a YouTube
19 channel, their own YouTube channel that has dozens of videos
20 about how these products operate. There are white papers.
21 There are many, many, many hundreds, if not thousands, of
22 pages on each product available.

23 Plaintiff has done nothing. You have no declaration,
24 no explanation of anything that they have done to try and
25 find this information. So they failed at the outset on the

1 first -- the first prong, whether or not the information was
2 publicly available or not. Here the information was.

3 And as you found in Imperium, you denied the
4 Plaintiff's motion to compel because you said Plaintiff
5 must, as an initial matter, demonstrate that the information
6 it seeks is not publicly available and that it has not been
7 diligent in seeking such information. You said the Court
8 finds that Plaintiff has failed to meet this threshold.
9 Plaintiff fails to identify any efforts it took to
10 investigate the non-accused products. Moreover, there is no
11 evidence offered to demonstrate Plaintiff's use of the
12 publicly available information.

13 The same could not be more true here. We have seen
14 nothing from the Plaintiff to identify any efforts it took
15 to investigate the non-accused products, and there's no
16 evidence that's offered by Wapp to demonstrate that it tried
17 or it used any of the publicly available information. It
18 has done nothing.

19 With respect to the second factor, as I said, in the
20 Honeywell case, Judge Love found that a cognizable theory of
21 infringement had been identified. The defendant in that
22 case said that they contested that and Judge Love said,
23 well, you didn't say anything soon enough.

24 We made our motion within three weeks of receiving
25 their supplemental contentions. We filed that on

1 December 23rd. We received their supplemental contentions,
2 I believe, on December 2nd or 3rd.

3 With respect to a showing of whether the products are
4 reasonably similar, again, this is the publicly available
5 information. Nothing.

6 In Honeywell -- in Honeywell, what the Plaintiff did
7 there is element by element it explained why the products
8 that it had identified were expected to be reasonably
9 similar to those for which it sought discovery. We have
10 nothing like that here.

11 Finally, with respect to diligence, given the reams of
12 information that is available -- and it is just volumes,
13 Your Honor. As I said, manuals, Help Centers, YouTube
14 channels, white papers and so forth. The Plaintiff has
15 shown nothing. It hasn't even tried to download that
16 information.

17 We didn't hear Mr. Parker say that they had downloaded
18 some of the products that were available and it just wasn't
19 sufficient. He just said it's not all there and these are
20 sophisticated products that you can't get at Best Buy.

21 Finally, Your Honor, with respect to the contentions,
22 again, we do believe that there has not been a showing. We
23 disagree strenuously with what Mr. Parker said, that we do
24 not dispute that what they are seeking are reasonably
25 related.

1 We don't understand what their theories are. We
2 haven't seen why or how they believe that these products for
3 which they are seeking discovery matter. We don't
4 understand even what some of these products are. And in
5 some of the definitions they identify something called AWS.
6 We don't know what that is. Perhaps it's Amazon Web
7 Services, but this isn't -- we're not Amazon. I don't know
8 what AWS is. It's not a product of ours. That's the only
9 acronym I know AWS is for.

10 So with all due respect, Your Honor, we believe that
11 their motion should be denied. We believe they have failed
12 to show what they need to show, and they have failed to
13 comply with the rules of this district, which they have very
14 strenuously asked to partake in, having opposed our motion
15 to transfer, and we should move forward on the products that
16 they identified.

17 They had almost 18 months from the filing of the
18 complaint until things got sorted out before they did their
19 contentions. They had plenty of time. They did nothing.

20 Thank you, Your Honor.

21 THE COURT: Thank you. Any response, Mr. Parker?

22 MR. PARKER: Yes, Your Honor, a few things.

23 First, as to the definition that was in our discovery
24 request and the -- maybe I should give you one or two
25 examples. The definition says that we're looking for

1 products or systems that are capable of, for example,
2 simulating mobile networks from any geographic location
3 world-wide for mobile application testing; providing a
4 library of real world mobile and broadband network
5 conditions. These are -- these are elements that are
6 essentially directly from the claims that are being asserted
7 in this action.

8 So it's not like we're simply asking for any
9 application that they have. We -- we have tried to tailor
10 it to the issues that will be in this litigation. And I
11 guess Mr. Reiter is now objecting to that definition, but
12 they had never previously stated that they had any problems
13 with the language of the definition, other than just the
14 generic it's over-broad, which was followed up by their
15 we're going to limit it to three specific things. So I
16 think it's a little disingenuous to be now starting to argue
17 about that.

18 Secondly, I just -- counsel referred to your Imperium
19 decision several times and I -- I did want to point out in
20 the Imperium Holdings decision that that action involved
21 physical items that could be purchased and disassembled,
22 which is quite a different scenario than what we've got here
23 where we're dealing with highly complex software, much of
24 the underlying software and certainly the source code of
25 which is unavailable to Wapp.

1 Also, in that case the crux of the issue ended up being
2 was the other -- the discovery sought going to products that
3 were reasonably similar, and as I just discussed, I don't
4 believe that there was a debate before this phone call about
5 whether or not what we were seeking is stuff that's
6 reasonably similar.

7 So they were asking in Imperium Holdings about
8 discovery of any, you know, image sensors or image
9 processors, which is a fairly broad and generic term that
10 really doesn't tie to -- to asserted claims particularly,
11 which is not like the way that we did with our definition.

12 So -- and, finally, I guess I would note that in that
13 opinion, Your Honor at the conclusion of it specifically
14 said that, you know, despite the fact that you were denying
15 that motion to compel there, you pointed out that the
16 defendants were still under a continuous obligation to
17 produce discovery of any products that are, quote,
18 reasonably similar.

19 So that's all we're looking for here, and really, I
20 think there's something of a question of reasonableness
21 here, both in the effort and the substance. The idea that
22 we can access -- you know, again, we asked the other side
23 would they -- would they confirm for us that what they are
24 alleging are free versions actually would be sufficient for
25 purposes of the issues of this case, that if we took some

1 free version, would we be able to, you know, to rely on the
2 fact that whatever it showed to us or didn't show to us was
3 sufficient for meeting the issues of this case, and they
4 have declined to give us that assurance.

5 And so -- and as far as we can tell, we did do a -- a
6 search a few days ago trying to figure out whether there
7 were free versions of the lists of products that we gave to
8 them that we thought were within the scope of our
9 definition, and I believe that well over half of them can't
10 be found. Whether or not the ones that can be found are
11 sufficient or not, there's a whole bunch that aren't found.

12 So, really, this seems like an attempt by the
13 Defendants to -- to hide the ball on us in a scenario where
14 they should be able to readily provide us with the
15 information. They should be readily able to provide us
16 with, for example, an operating version of a system that
17 we can analyze.

18 And just today they actually said they would give us
19 operable versions of the three systems that they have agreed
20 they would produce, and there's just no particular reason
21 why they shouldn't be able to do it similarly for these
22 other products.

23 I think I will stop now, unless Your Honor has
24 questions.

25 MR. REITER: Your Honor, if I could just respond

1 briefly. This is Mark Reiter again.

2 THE COURT: Yes, go ahead.

3 MR. REITER: I think there's a more fundamental
4 question here, Your Honor, than whether there are working
5 versions available or not. The more fundamental question is,
6 did the Plaintiff comply with its obligation under the Local
7 Patent Rules and identify the products that it should have
8 identified in its contentions. They didn't. That is the
9 fundamental question here.

10 It is their -- it is reams of publicly available
11 information about the products. They didn't have the
12 working versions of the products they charted. They were
13 able to, nonetheless, chart them, we think deficiently, but
14 they, nonetheless, identified them sufficiently such that
15 we're not challenging whether those products are reasonably
16 in the case.

17 The problem here is they didn't do their homework.
18 They didn't do their work. Now they're trying to shift the
19 burden to us to try to figure things out.

20 You heard Mr. Parker again say we tried in our
21 definition to summarize the claim elements. Well, that,
22 again, is violative of what Judge Love said and you
23 recognized -- what Judge Love said in Honeywell and what you
24 recognized in Imperium that Plaintiff is not entitled to
25 discovery of all things that might be relevant to the

1 patent. That's what they're trying to do here. It is not
2 our burden to do that. Particularly, again, when there is
3 so much information.

4 And you didn't hear -- other than the statement that a
5 couple of days ago or a few days ago they tried to download
6 a product or two, you didn't hear anything about any
7 searching on the Micro Focus website. You didn't hear
8 anything about information that was lacking for the purposes
9 of being able, in the first instance, in the infringement
10 contentions to identify these products.

11 What was lacking from the manual? What was lacking
12 from the Help Center? What was lacking from the YouTube
13 training videos, from the white papers? You didn't hear any
14 statement that they ever tried to look for that information,
15 and now they're trying to shift the burden to us and say
16 just give us everything. You guys go figure it out and give
17 us everything. We haven't shown that it's not publicly
18 available. We haven't shown you anything that we've done.

19 In fact, Your Honor, in early December we made the
20 source code available pursuant to Rule 3-1(g) for the
21 products that they identified. To this day -- and I
22 understand that today things are a little bit different in
23 the world. But to this day, there has been no effort on the
24 part of Plaintiffs to go inspect that source code, no effort
25 at all, none.

1 So they have not done what they need to do, and they're
2 now trying to put the burden back on us, despite the fact
3 that they didn't chart them, despite the fact that they
4 didn't identify these products, despite the fact that
5 they're going on a fishing expedition. They haven't
6 identified a theory. They haven't identified how these
7 products might be relevant for the theory they allege they
8 have identified, and they haven't been diligent.

9 And with respect to that last sentence in Imperium,
10 what I believe that goes to -- and I certainly don't want to
11 be interpreting your language to you. But what I believe
12 that sentence went to was in a part of the case the parties
13 agreed that certain products were reasonably similar and the
14 defendant was producing that, and my understanding of that
15 last sentence was with respect to the products for which
16 there was no dispute over reasonable similarity, the
17 defendant had an ongoing obligation. But with respect to
18 the products that were at issue in the motion where
19 plaintiff had not shown that it had been diligent, where
20 plaintiff had not shown that there was a lack of publicly
21 available information, that sentence didn't apply.

22 And I'm happy to answer any questions, Your Honor.

23 THE COURT: Okay. Thank you. Anything else?

24 MR. PARKER: Your Honor, just one point or a
25 combination point.

1 Counsel for Defendant seems to be trying to say that we
2 are not entitled to anything unless we have put it into
3 infringement contentions, and the case law is very clear
4 that we're not strictly limited to that, that there are
5 other things that are appropriately discoverable.

6 And, indeed, I think it's Defendants that are trying to
7 shift the burden here. We gave them, during the meet and
8 confer process, a very specific list of products that we
9 thought met -- fell within our definition, and they haven't
10 denied that those products fall within our definition.
11 They're just saying we're not going to do anything for you.

12 And so the notion of shifting the burden to them, we
13 have -- we have given them a list. So I -- those
14 products --

15 MR. REITER: Your Honor, again, Mark Reiter. If they
16 were able to identify those products, why didn't they chart the
17 products? Why didn't they put them in their contentions? They
18 didn't. And now to come in and try and fill in the gap without
19 satisfying the requirements that were laid out in Imperium and
20 in Honeywell.

21 And Judge Folsom certainly did not, as I've already
22 said and as you recognized, there was no -- no bottom line
23 rule that they get this discovery. They may, if they show
24 and satisfy the elements.

25 As I said, Your Honor, and I'll offer this to the Court

1 if it would be helpful, we have that declaration ready to go
2 to demonstrate the public -- just the volume of publicly
3 available information and a short five page response to what
4 it is that they filed. It's just five pages, along with
5 that declaration, Your Honor.

6 THE COURT: Okay. Thank you. And let me tell you,
7 after hearing everyone's arguments, here's what I'm going to
8 do. I have not studied the actual motion to compel. We just
9 kind of denied it summarily, and my clerks do that kind of
10 routinely. So because there was not a response, I did not
11 examine it. After hearing the arguments, I now want to read
12 it, so I will give the defense the opportunity to file a
13 response and then -- and it can be a normal response. I'm not
14 limiting you to -- the limits are only under the Local Rules.
15 The question is, can you do that in like seven days?

16 MR. REITER: I -- I can do that today, Your Honor.

17 THE COURT: Okay. And then the Plaintiff, if you
18 want to file a reply, you can do that within seven days, as
19 soon as they file their response. And then I'll take care of
20 it pretty quickly.

21 I just want to read it, and it's not fair for me to
22 read this without giving them a chance to respond to what's
23 written. I just can't make a decision -- I need to study
24 it. I just can't make a decision based on what you said.
25 But I will resolve it pretty quickly.

1 Okay. Anything else I can do for the Plaintiff today?

2 MR. PARKER: No, Your Honor.

3 THE COURT: Anything from defense in addition?

4 MR. REITER: No, Your Honor. Thank you.

5 THE COURT: Okay. They said they would file that
6 today. Again, is seven days -- let me just ask, is the
7 Plaintiff going to file a reply?

8 MR. PARKER: Your Honor, I think we definitely will,
9 and actually that does raise a point. The other -- the
10 Defendants' opening claim construction brief is due today, and
11 so our reply to that is also due seven days from now. So
12 either -- I would appreciate to either hold off on filing their
13 opposition to this motion to compel for a couple of days or
14 that we be given at least a couple of days more than seven so
15 that we don't have both of those due on the same day.

16 THE COURT: So, Mr. Reiter, why don't you -- I was
17 going to give you seven days to file the response. Do you want
18 to go ahead and take them up on that and then -- just to
19 stretch it out so that all those things aren't due at the same
20 time?

21 MR. REITER: Sure, sure. I appreciate it, Your
22 Honor. We'll file -- it may be sooner than seven days but --

23 THE COURT: No, that's fine.

24 MR. REITER: But we won't file it today so that Mr.
25 Parker can get his claim construction reply brief done.

1 THE COURT: Okay. So, Mr. Parker, once they file it,
2 you have seven days to file the reply and I think that should
3 solve the problem.

4 MR. PARKER: Sure. Thank you, Your Honor.

5 THE COURT: Okay. Y'all have a great day and stay
6 safe. Thank you.

7 MR. REITER: Thank you, Your Honor.

8 MR. PARKER: Thank you, Your Honor.

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19 I certify that the foregoing is a correct transcript from
20 the record of proceedings in the above-entitled matter.
21

22 _____
23 Jan Mason

Date